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IN THE UTAH SUPREME COURT

BRENT D. YOUNG, Plaintiff/Appellee, -vs- SALT LAKE COUNTY AND AARON D. KENNARD, SALT LAKE COUNTY SHERIFF. Defendants/Appellants.	Court Case No. 20010101-SC Category No. 15

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

IN THE UTAH SUPREME COURT

BRENT D. YOUNG, Plaintiff/Appellee, -vs- SALT LAKE COUNTY AND AARON D. KENNARD, SALT LAKE COUNTY SHERIFF, Defendants/Appellants.	Court Case No. 20010101-SC Category No. 15

APPELLANTS' REPLY BRIEF

Defendants/Appellants (hereinafter the "County") submit the following reply brief in further support of their appeal from the judgment below:

ISSUES PRESENTED FOR REVIEW

Young's brief presents a "statement of the issues" which recites his version of the issues before the court. Young's recitation of the questions before the court fails to address the legal issues raised in the County's appeal and inaccurately characterizes the records Young requested. Young's request and the court's order deals with both the Sheriff's Office investigative files and disciplinary records. The County's brief clearly sets forth the issues presented for review and now before this court.

STATEMENT OF FACTS REPLY

Young's statement of the facts does not accurately represent his request for records or the court's order to disclose "the disciplinary records and investigative files of any sworn member of the Salt Lake County Sheriffs Department where the conduct investigated concerned the inappropriate use or handling of a firearm or inappropriate sexual conduct, both verbal or physical." R. 168-169 Young's request sought more than completed disciplinary files. R. 50, 92,102. Young requested all internal investigations and disciplinary records. R. 146.

Young stated that the disciplinary records are necessary because "the County maintains a policy that any discipline must be consistent to that imposed in similar cases, must be fair and must be appropriate or proportional to the conduct." Appellee's Brief at 4. Thereafter, Young instructs the court that the Sheriff's discipline must be consistent and proportionate. Young makes reference to the Sheriff's policy at R. 150.

The Sheriff's discipline policy at R. 150 has been attached as Addendum "A" hereto for the court's convenience. A reading of the policy establishes that Young is attempting to minimize several elements within the discipline policy. The policy requires discipline to be equitable. The policy identifies five criteria that the Deputy Sheriff's Merit Commission should consider when determining if discipline was equitably administered. Disciplinary actions should be consistent, fair, timely, appropriate and progressive. Sheriff's Office Policy and Procedure 2-4-06.01, Addendum A. Each of

these terms is defined within the policy. This policy is not the same as the policy referenced by Young in either Lucas[1] or Kelly[2]. The Deputy Sheriff's Merit Commission will be considering "consistency" as defined in the policy but proportionality is not a factor. The word proportionality is never used. In reviewing the definitions, proportionality could be considered only to the extent it falls under the definitions of "consistent" or "appropriate". Unlike the City's policy on discipline cited by Young, the Deputy Sheriff's Merit Commission policy sets out five factors rather than two. The policy does not indicate that a particular weight should be given to any one criterion. The policy's stated goal is *equitable* discipline.

REPLY ARGUMENT

I.
A TIMELY APPEAL IS REQUIRED FOR THE COURT TO HAVE JURISDICTION. Utah Code Ann. §63-2-404(2)(b)(ii).

Young does not dispute that a timely appeal pursuant to Utah Code Ann. §63-2-404(2)(b)(ii) is a jurisdictional requirement. Instead, Young indirectly argues that an agency can enlarge the statutory period by a late response. Young cites no legal authority for this position but relies solely upon the legislative intent in enacting the statute.

On February 4, 2000 and February 23, 2000, Young made two requests for Sheriff's office records under GRAMA. On March 14, 2000, the custodian of records denied Young's

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[1] Lucas v. Murray Civil Serv. Comm'n, 949 P.2d 746 (Ut. App. 1997)

[2] Kelly v. Salt Lake Civil Serv. Comm'n, 8 P.3d 1048 (Ut. App. 2000)

request for records. On March 28, 2000, Young filed an appeal with the chief administrative officer. The chief administrative officer did not respond within the 5 day period provided in Utah Code Ann. §63-2-401(5)(a)(i). That section requires a response within five business days after receipt of the notice of appeal. These facts are not disputed by the parties.

Based upon the County's interpretation of the statute, Young had 30 days to appeal his records request once it was deemed denied. This period began to run five business days after his appeal to the chief administrative officer, March 28, 2000.

On April 20, 2000, the chief administrative officer responded to the March 28, 2000 appeal. Young filed his appeal 23 days after this late response but 42 days after the request was deemed denied pursuant to Utah Code Ann. §63-2-401(5)(b). The statutory wording at Utah Code Ann. §63-2-401(5)(b) is clear;

> "[I]f the chief administrative officer fails to make a determination within the time period specified in Subsection (5)(a), the failure shall be considered the equivalent of an order denying the appeal." Utah Code Ann. §63-2-401(5)(b), (1995).

As indicated by Young, the rules of statutory construction provide that you first look to the plain language of the statute to give effect to its meaning and intent. Appellee's brief, at 8. Although courts generally rely upon the plain language rule of statutory construction, an equally important rule of statutory construction is that a statute should be construed as a whole, with all of its provisions construed to be harmonious with each other and with the overall legislative objective of the statute. Nixon v. Salt Lake City Corp., 898 P.2d 265, 268 (Utah 1995). If the court applies Young's interpretation of Utah Code Ann.§63-2-

404(2)(b)(ii), both Utah Code Ann.§63-2-401(5)(b) and the subsequent provision of Utah Code Ann. §63-2-404(2)(b), subsection (iii) become meaningless.[3]

Admittedly, the Government Records Management Act is a complex statute. Each section must be read in light of the entire act to ensure that all provisions are ultimately complied with and have meaning when the entire act is read.

GRAMA is drafted in a manner that when subsections are quoted in isolation, a different interpretation is possible. This Court in Sullivan v. Scoular Grain Co. of Utah, 853 P.2d 877 (Utah 1993), provided a resolution for those situations when applying the plain language rule of statutory construction would create an ambiguity or conflict with other statutory provisions. In Sullivan, the court rejected a literal reading of the statute because it conflicted with other provisions of the act and with the overall intent and purpose. In Sullivan, the court relied upon the overall intent and purpose of the statute. This Court was recently faced with construing unusual language that appeared to be contrary to conventional statutes of limitations. In resolving the issue presented, the court looked to the overall intent and purpose of the statute to determine its meaning. Clark v. Clark, 2001 UT 44, ¶ 9, 27 P.3d

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[3] There are several other provisions within GRAMA that are ignored by Young. Some of these provisions seem to even support his arguments standing alone. However, when these provisions are read in conjunction with the other provisions of GRAMA they take on a different interpretation. For instance, Young makes no argument to the court that the provisions of Subsection (5)(a)(ii) or (5)(c) apply in this case. Yet, both of these sections extend the time period for the chief administrative officer's response, thereby effectively providing an extension of the time for petitioning for judicial review.

538.

Using the rules of statutory construction, every effort should be made to interpret Utah Code Ann. §63-2-404(2)(b)(i) using its plain meaning. However, if by applying a plain meaning to Utah Code Ann. §63-2-404(2)(b)(i), it renders the subsequent subsections meaningless or creates a conflict among provisions, the court must make an effort to harmonize the provisions in light of the statutes overall intent and purpose.

The County's interpretation allows the court to harmonize the sections governing judicial review (Utah Code Ann. §63-2-404) with the sections governing appeals found at Utah Code Ann. §63-2-401. The jurisdictional requirements of §63-2-404 cannot be separated from the response required upon appeal under §63-2-401.

Using principles of statutory construction and case law defining terms,[4] Young's appeal to the chief administrative officer was deemed denied after 5 business days and his time for appeal began to run pursuant to Utah Code Ann. §63-2-404(2)(b)(ii). Therefore, Young's request for judicial review was untimely and the district court lacked jurisdiction to entertain Young's request for records.

II.
THE RECORDS REQUESTED BY YOUNG ARE NOT PUBLIC RECORDS.

Young's request dated February 23, 2001 requested the following records:

(b) Any records concerning any investigation of any member of the Salt Lake County Sheriff's Department that concerned an improper use or handling of

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[4] See County's opening brief at pages 10-11 and page 15.

> a firearm or that concerned any sexually inappropriate behavior, both verbal or physical. R. 146.

Young argues on appeal that his request seeks "completed disciplinary records" w hich are classified as public records by definition under Utah Code Ann. §63-2-301(2)(o). Appellee's brief, at 11-12. First, Young's request is more encompassing than completed disciplinary files. His request includes investigative and disciplinary files whether complete or not. His request also covers investigative files where the party was exonerated and no adverse action was taken. In fact, Young argues these files will be the most beneficial because they will establish an allegation of similar conduct with no action taken. Appellee's brief, at 15. Clearly, *investigative files* are not covered under Utah Code Ann. §63-2-301(2)(o), the provision Young urges the court to use in finding the records are public. Utah Code Ann. §63-2-301(2)(o) is limited to completed disciplinary records.

In this case, Utah Code Ann. §63-2-301(2)(o) is applicable to the completed and appealed disciplinary records of sworn officers[5]. Utah Code Ann. §63-2-301(2)(o) specifically indicates that it is not applicable when the record sought is expressly exempt from disclosure by another state statute. The County has demonstrated that sworn officer's completed disciplinary records would fall under the category of a public record but for Utah Code Section §17-30-19, which expressly restricts access to un-appealed disciplinary records.

Young attempts to side step Utah Code Ann.§17-30-19 in his quest for the un-

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[5] Young has already received copies of all formal disciplinary action taken when the discipline taken has been appealed. Young has not received un-appealed discipline or minor personnel actions such as verbal warnings.

appealed disciplinary records of sworn officers. Young argues that since his request is directed to the Sheriff and not the commission referred to in the statute, he can gain access to the records. Utah Code Ann.§17-30-19(1) requires the person ordering discipline to file written charges with the commission and serve the officer. At the Salt Lake County Sheriff's office all disciplinary actions identified at §17-30-19(1) are taken by the Sheriff. After an officer is notified of the proposed disciplinary action, the officer may appeal in writing to the commission. Utah Code Ann.§17-30-19(2)(a)(ii) states:

> "(ii) In the absence of an appeal, a copy of the charges under Subsection (1) may not be made public without the consent of the officer charged."

As a result of Utah Code Ann.§17-30-19(2)(a)(ii), Young was not provided with the un-appealed disciplinary records of officers. These records are not covered under Utah Code Ann. §63-2-301(2)(o) as argued by Young. Instead, they are properly classified by the Sheriff as "protected documents" pursuant to Utah Code Ann.§ 63-2-304(9) and Utah Code Ann.§17-30-19(2)(a)(ii).

In addition to the protected status given un-appealed disciplinary files, Utah Code Ann §63-2-304(9) allows the Sheriff's office to classify investigative files as "protected" documents. In fact, no other provision of GRAMA discusses investigative files and no provision classifies investigative files as public documents.

The district court's findings do not dispute the protected classification. Addendum B, page 2, ¶3, Appellant's Opening Brief. In fact, the court acknowledged the reasoning behind the protected status of these documents. Addendum B, page 3, ¶6. In addition, protecting the

right to privacy in personal data gathered by a government entity is one of the constitutional interests specifically recognized by GRAMA. Utah Code Ann.§63-2-102(b). The district court's decision to affirm the protected status of these documents was sound and should be affirmed by this court.

III.
THE DISTRICT COURT MUST COMPLY WITH UTAH CODE ANN. §63-2-202(7)(a-e) BEFORE ORDERING THE RELEASE OF PROTECTED DOCUMENTS.

Both parties are in agreement that before releasing a document properly classified as "protected" the court must comply with Utah Code Ann. §63-2-202 (7) (a)-(e). Both parties are also in agreement that the language found at Utah Code Ann. 63-2-202(7) is not immediately clear. Young argues that Utah Code Ann.§ 63-2-202(7) must be construed in light of GRAMA's overall legislative intent and the County argues that this provision should be read in light of the legislative history and the ordinary meaning attached to the phrase "jurisdiction over a matter in controversy".

The result is the same, regardless of whether the legislative intent is considered or the legislative history. Young's citations to the legislative intent are not complete. Utah Code Ann.§63-2-102 recites the legislative intent. The legislative intent recognizes two constitutional rights and a public policy interest. The constitutional rights were identified as; the public's right of access to the information concerning the conduct of the public's business and the right of privacy in personal data gathered by a governmental entity. Utah Code Ann. §63-2-102(1)(a-b), 1992. The public policy interest recognized by GRAMA is allowing a

government to restrict access to certain records for the public good. Utah Code Ann. §63-2-102(2), 1992.

When §63-2-202(7)(a) is interpreted in light of the rights recognized by the legislature, an interpretation that district courts are limited in their ability to order the release of protected records unless the district court has jurisdiction over the matter in controversy is consistent with the legislature acknowledging a public policy interest in allowing the government to restrict access to certain records for the public good. Once a matter is being litigated, GRAMA acknowledges the court's ability to determine whether a document is necessary for a full and fair adjudication of the controversy.

Young argues that the County's interpretation of GRAMA "not only restricts, but completely precludes access." This is not necessarily true. The County's position is as follows: When a party petitions the district court for judicial review of a governmental entities' denial, the district court can review the classification and release any public records. However, if the entity properly classified the document, the district court is limited in releasing properly classified documents to situations when a "matter in controversy" is before the court. The County has consistently maintained that Young's request for judicial review is premature or not ripe. It is the County's position that Young, like the plaintiffs in Lucas, Kelly and Tolman[6], should proceed before the merit commission. Utah Code Ann. §63-2-207(2) specifically authorizes the release of records during an administrative proceeding

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[6] Tolman v. Salt Lake County Attorney, 818 P.2d 23, 28 (Ut. App. 1991).

provided that the administrative body follows the procedure set forth at Utah Code Ann.§ 63-2-202(7)(a-e). Young made his request to the administrative body and at this point in time, that request has been denied. Young was not without recourse. This section is intended to require persons seeking records over which there is a matter in controversy to present that request to the body with current jurisdiction over the controversy. *See* Utah Code Ann. §63-2-207(2)(b). The requirement that the court have jurisdiction over the matter in controversy prevents a party from starting a GRAMA proceeding in order to circumvent the other forum's powers over the discovery process.

In order to prevent the circumvention and disruption of regular court and administrative processes, this court should interpret Utah Code Ann. §63-2-202(7)(a) as requiring the court to have jurisdiction over the matter in controversy prior to issuance of an order. The district court failed to meet this requirement.

IV.

UNDER SECTION 63-2-202(7)(e) OF GRAMA, COURT-ORDERED RELEASE OF THE UN-APPEALED DISCIPLINARY RECORDS IS BARRED BY UTAH CODE ANN. §17-30-19, WHICH PROHIBITS THEIR BEING MADE PUBLIC WITHOUT THE DISCIPLINED OFFICER'S CONSENT

When the district court considered Young's request for the un-appealed disciplinary records, the County informed the court that Utah Code Ann. §17-30-19(2)(a)(ii) governed the release of these records and GRAMA requires the district court to comply with Utah Code Ann. §63-2-202(7)(a-e) prior to ordering the release of a protected record. Specifically, Utah Code Ann. §63-2-202(7)(e) provides in pertinent part

as follows;

> " (7) A governmental entity shall disclose a record pursuant to the terms of a court order signed by a judge from a court of competent jurisdiction, provided that: . . .
>
> (e) where access is restricted by a rule, statute, or regulation referred to in Subsection §63-2-201(3)(b), the court has authority independent of this chapter to order disclosure."

Subsection §63-2-201(3)(b) addresses "records to which access is restricted pursuant to court rule, another state statute, ..." Utah Code Ann.§17-30-19(2)(a)(ii) is a state statute that restricts the release of un-appealed disciplinary records.

Since Utah Code Ann. §63-2-202 (7)(e) requires that when another statute restricts access the court must have authority independent of GRAMA to release the record, the district court was required to identify its authority to release the un-appealed disciplinary records of deputies.

The County argued before the district court that Utah Code Ann. §17-30-19 prohibited the release of the un-appealed disciplinary records and the court was without authority to order their release. R. 95-97; R. 132. No evidence was before the district court that another statute authorized the release of un-appealed disciplinary records. Therefore, Utah Code Ann. §63-2-202(7)(e), read in conjunction with Utah Code Ann. §17-30-19(2)(a)(ii), is controlling and prohibits the release of the un-appealed disciplinary records.

The County requests a reversal of the district court's decision releasing the un-appealed disciplinary records because the court's decision to release the records directly

conflicts with Utah Code Ann. §17-30-19(2)(a)(ii). A reversal of the decision to release investigative files is also appropriate because the district court failed to correctly apply the standards set forth at §63-2-202 (7)(e) when ordering their release.

V.
YOUNG'S REQUEST FOR ATTORNEY FEES SHOULD BE DENIED.

Young is requesting attorney fees pursuant to Rule 33(a) of the Utah Rules of Appellate Procedure, which permits the court to access damages for a frivolous appeal taken for delay. Young argues that the County's appeal is contrary to the plain language of the statute. The County's appeal outlines the specific statutory provisions it relies upon to support its arguments of untimeliness and the district court's failure to follow the requirements of Utah Code Ann. §63-2-207(7). The County acknowledges that there is limited case law interpreting GRAMA. However, the case law relied upon supports the County's arguments to reverse the district court's decision in this case and deny Young access to the requested records.

The County continues to acknowledge its concern over the release of private data. The County does not believe that redaction solves the problem of releasing private data. However, the County has additional concerns, such as future classification and release of investigative files and disciplinary records. The legal issues raised by the County on appeal are legitimate and worthy of consideration by this court. They are not frivolous.

The County respectfully requests the Court deny Young's request for attorney fees pursuant to Utah Rule of Appellate Procedure 33(a).

CONCLUSION

The district court lack jurisdiction to hear Young's untimely request for judicial review. In addition, Utah Code Ann. §63-2-202(7)(a) requires the district court to have jurisdiction over the matter in controversy prior to ordering the release of protected records. The district court never met the requirement of Utah Code Ann. §63-2-202(7)(a) prior to issuing its order.

For the foregoing reasons, the County asks this Court to vacate the summary judgment awarded Young and either: (a) remand for entry of an order dismissing Young's petition for judicial review as untimely; or (b) remand for entry of summary judgment in the County's favor denying Young's GRAMA request for court-ordered disclosure of the protected record.

DATED this 16th day of October, 2001.

DAVID E. YOCOM
Salt Lake County District Attorney

/s/ Valerie M. Wilde

VALERIE M. WILDE
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CERTIFICATE OF MAILING

I certify that on the 16th day of October, I mailed two copies of the foregoing Appellant's Brief, postage prepaid to:

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Jeri Pace

ADDENDUM A

2-4-06.00 Disciplinary Actions

2-4-06.01 Equitable Disciplinary Actions

Disciplinary actions, in order to be equitable, should meet the following criteria:

(1) Consistent - Similar disciplinary action should be taken for similar offenses.

(2) Fair - Disciplinary action requires due process and penalties consistent with the seriousness of the misconduct.

(3) Timely - Disciplinary action should be administered within a reasonable time period after the need for such action is discovered and confirmed.

(4) Appropriate - Disciplinary action must reflect the seriousness of the misconduct, the past history of the member in violation, and an appraisal of the options available to influence the member to change his or her behavior.

(5) Progressive - Consistent with the intent to create self-discipline, disciplinary actions should be progressive in nature. The usual sequence of disciplinary actions will be verbal warning, written warning, suspension and/or demotion, and termination. Deviations from procedure may be justified depending on the severity and circumstances of the action(s) to be disciplined.

2-4-06.02 Types of Discipline

(1) Verbal Warning - Verbal censure of a member. A verbal warning will be documented in writing and copies will be placed in the Division and Sheriff's Office Personnel files.

(2) Written Warning - Written censure of a member. Copies will be filed in the Division's and the Sheriff's personnel files on the member. The member may request and receive a verbal explanation from the supervisor issuing the written warning. The member may also prepare and have included with the written warning a brief written explanation or rebuttal.

(3) Suspension - Action which denies a member the authority to perform his or her duties. In the case of sworn personnel, a suspension acts to take away status as a peace officer during the period of suspension. Suspension results in loss of pay and benefits.

(4) Demotion in Rank/Pay - Reduction in rank and/or pay.

(5) Termination - Termination of the employment of the member.

(6) For purposes of this chapter, verbal and written warnings are deemed minor discipline and suspensions, demotions, and termination are deemed major discipline.

Revised 11-12-96